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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 240

HARRY HANSON,

Petitioner,

vs.

LEHIGH VALLEY RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JAMES RAYMOND BERRY,
Counsel for Petitioner.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 240

HARRY HANSON,

against *Petitioner,*

LEHIGH VALLEY RAILROAD COMPANY.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice, and Associate Justices of the Supreme Court of the United States:

Harry Hanson, the petitioner herein, respectfully presents his petition for a Writ of Certiorari to review the final judgment of the United States Circuit Court of Appeals for the Third Circuit, by which judgment the judgment of the United States District Court for the District of New Jersey in favor of the petitioner and against the respondent in the amount of Seventy-Five Hundred Dollars was reversed and a new trial ordered. The judgment of the Circuit Court of Appeals was rendered on May 8, 1941.

I.

The Opinion of the Court Below.

The opinion of the court below was filed on the 8th day of May, 1941. It has not yet been officially published but

appears in the Advance Reports of the Federal Reporter for the week of —— 1941. A certified copy of the opinion is attached to and made part of the record used in the court below, which record completed as required by the rules has been filed in this court.

II.

Statement of the Case.

The plaintiff's action was brought to recover damages resulting from personal injuries sustained by him due to the alleged negligence of the defendant. The plaintiff was employed by Charles Merberg & Sons. Merberg & Sons were engaged in demolishing the refining plant of the American Sugar Company in Jersey City, New Jersey. This plant consisted of a large number of buildings occupying two square city blocks (R. 29, 11. 20-25). It was bounded on the east by Washington Street, on the west by Warren Street, on the north by Essex Street, and on the south by the Gap (a river) (R. 6 and 7; R. 30, 11. 1-20). Dudley Street, running east and west, was located approximately midway between Essex Street on the north and the Gap on the south (R. 30, 11. 20-25). A railroad track owned by the defendant was located on the center of Dudley Street, extending from Washington Street to and across Warren Street. This track had a slight down grade toward Warren Street.

The entire area occupied by the Sugar Company buildings, including both ends of Dudley Street, was enclosed by a fence (R. 34, 1. 20, to R. 35, 1. 20). This fence had been constructed by Merberg & Sons. It consisted of wooden posts extending upright four or five feet above the ground, with rails fastened from post to post at the top and midway between the top and the ground (R. 36, 11. 1-25). A gate was built across the track on Dudley Street at War-

ren Street (R. 34, 1. 20, to R. 35, 1. 20). Merberg & Sons maintained a day and night watchman to protect this area and their property contained within it (R. 33, 11. 20-23).

During the course of the work and in connection therewith the defendant railroad at the request of plaintiff's employer, delivered gondola type freight cars to Dudley Street at the point where the work of demolition was in progress. This delivery of freight cars was stipulated between the parties at the outset of the trial, the stipulation being as follows:

> "First, the defendant delivered railroad cars including the one referred to in this case to Charles Merberg & Sons, Inc., upon the request of one of its employees" R. 4, 11. 8-11).

This stipulation is probably the most important single fact in the case. It will be observed that by it the defendant admits an unconditional and unqualified delivery to Merberg & Sons, Inc. No limitation upon the use or the manner of use of the cars by Merberg's employees in the course of their work is either stated or inferable. Emphasis is placed upon this agreement of the parties at the outset of the statement of facts because the plaintiff contends that it established and fixed his rights on the freight car on the date of his accident and, further, because the Circuit Court entirely overlooked it in rendering its decision.

These cars would be placed by the defendant's employees. It was the custom and practice of the defendant's employees upon delivering the car to apply the hand brake and to place a piece of wood called a chock in front of one of the wheels (R. 4, 5, 8, 11. 20-25; 9 11. 5-10). This custom and practice was also admitted by the defendant as part of the stipulation above referred to (R. 4, 5). Unconditional control, custody and supervision of the cars passed to plaintiff's employer after their delivery.

On the afternoon of September 22, 1936, a train crew of the defendant placed a fifty foot car on the Dudley Street track (Dudley Street according to the same stipulation being a public highway (R. 4, 11. 17-20) about fifty feet from Warren Street and on the slight down grade (R. 36, 11. 10-20)). At the trial, defendant offered testimony to show that before leaving it they applied the hand brake and placed a chock in front of one of the wheels (R. 332-334). This fact was in dispute, the plaintiff contending that the jury was entitled to infer from all of the proof that the car was not braked or chocked as described, or that if the car was braked or chocked, the operation was done negligently.

The plaintiff, Harry Hanson, was in the employ of Merberg & Sons, Inc. as its superintendent. He was in charge of the work of demolition (R. 7, 1. 18).

The work was commenced on May 1, 1936, and had progressed continuously from then until the time of the accident (R. 7, 1. 11). The buildings being demolished were constructed of brick supported by steel girders. These walls were torn down and the steel and scrap iron removed. Naturally, the nature of the work occasioned the gatherings of large quantities of brick, lumber and debris of steel which covered the ground of the entire operation (R. 9, 11. 12-20). The nature of this condition can best be understood by an examination of the photograph (Exhibit P-1). The walls of the buildings were torn down by the use of a crane and tractor similar to the one appearing in the photograph. The method employed was to attach one end of a heavy steel cable to the arm of the crane and the other end to the wall which was being demolished. Strain would then be placed upon the cable and the wall pulled down. From the debris the scrap iron would then be removed, placed upon the railroad cars and transported by the defendant as a common carrier. Depending upon the location of the debris and of the wall to be demolished, the opera-

tion of the crane was frequently hampered by reason of lack of space.

The wall which was being torn down at the time of the accident was located upon the northerly side of the track and distant about one hundred and fifty feet from the railroad car. The space between the northerly side of the track and the wall was so covered with debris that it was necessary to operate the crane from the south side of the track (R. 11, 11. 8-25), and as a result of this the car lay between the crane and the wall. Two of the plaintiff's coemployees attached the steel cable, which was seven-eighths of an inch in diameter, to the crane and two others who were upon the wall of the building attached the other end to it (R. 113, 11. 8-18; R. 113, 1. 20). Pressure was then applied by the crane operator and the slack taken out of the cable. As this was done, it was observed that if the pressure necessary to tear down the wall was applied, the cable would come in contact with the side of the railroad car (R. 114, 1. 8). This was not the only time when it was necessary to operate the crane when the car was between it and the wall to be pulled down. On previous occasions defendant's employees had placed cars on the track in such position that they knew or should have known that the ordinary operation of the crane might cause the cable to come in contact with the car and that if this did occur, it would be necessary for one of the employees of the contractor to board the car and take some means of preventing damage to the car or cable. On previous occasions when the cable had come in contact with the car, it was the common practice to place a wooden plank between the cable and the car in order to prevent damage to either (R. 119, 11. 8-12). For the purpose of doing this and of then continuing his direction of the operation, Hanson boarded the car. Having placed the plank beneath the cable, thus preventing its coming in contact with the steel

car, he signaled the crane operator to take the slack out of the cable (R. 15, l. 3). It may be important to point out that the pressure which was applied to take the slack out of the cable was considerably less than that necessary to tear down the wall (R. 15, l. 10) and it was inferable that the comparatively light pressure applied would have been insufficient to have moved the car had the brakes been properly applied. The crane operator followed the plaintiff's directions and having turned the crane to the extent necessary to tauten the cable, brought it to a stop and awaited Hanson's order to apply the pressure necessary to tear down the wall. After the crane came to a stop, the car moved down the grade, as a result of which the plank was released and was thrown back into the car, striking the plaintiff and injuring him (R. 15, l. 15).

Thomas Del Duca and John Hansen boarded the car immediately in order to aid the plaintiff, who had fallen and was lying on the floor of the car. In doing so, Del Duca grabbed the brake wheel and it swung with him (R. 115, ll. 13-25). This fact is of extreme significance because the brake wheel cannot be turned in this way if the brake is properly applied (R. 116, ll. 6-14). It is not in dispute that in order to put the brake in working order, it is necessary to affix a cog or "dog" in a ratchet at the lower end of the brake after the brake wheel has been fully tightened. When this is done, the brake wheel cannot be turned, nor the brake in any manner released until the cog or "dog" is first lifted from the ratchet. There is no denial, therefore, that if the testimony of Del Duca is correct, the brake was not in working order at the time of the accident. There is also testimony by John Hansen to the same effect as that of Del Duca (R. 172, ll. 11-16).

Both witnesses also testified that there were no chocks under the car wheels when they inspected them sometime

after the accident, and this is borne out by the testimony of defendant's witness, James Menge (R. 340, 11. 4-8).

The trial court submitted the issues of the negligence of the defendant, contributory negligence and assumption of risk of the plaintiff and invitation of the plaintiff to be on the car at the time and under the circumstances of the accident to the jury. These issues were resolved against the defendant and in favor of the plaintiff and a verdict of Seventy-Five Hundred Dollars returned. The judgment entered on this verdict was ordered reversed by the Circuit Court of Appeals, which declared that as a matter of law the plaintiff was a licensee and not an invitee on the defendant's car at the time of his injury.

III.

Grounds on Which the Jurisdiction of This Court is Invoked.

This action was originally instituted in the United States District Court for the District of New Jersey. The petitioner is a citizen of the State of Connecticut, the defendant is a corporation of the State of Pennsylvania and the amount in controversy is in excess of Three Thousand Dollars.

The date of the final judgment to be reviewed is May 8th, 1941, on which day the opinion of the Third Circuit Court of Appeals and the judgment adverse to the petitioner were entered.

The petition here for a Writ of Certiorari is made under authority of Section 240 of the Judicial Code (28 U. S. 359 § 347) which expressly authorizes this court to require a cause to be certified to it for determination after judgment in a Circuit Court of Appeals.

The accident suffered by petitioner happened in New Jersey. Consequently, his right to recover must be determined by the common law of the State of New Jersey

(Erie R. R. Co. v. Tompkins 304 U. S. 64). Petitioner believes and prays that this court should take jurisdiction because the decision of the Third Circuit Court of Appeals is in conflict with the decisions of the courts of the State of New Jersey on similar problems (Riley v. Jersey Leather Co., 100 N. J. L. 300; 126 Atl. 457; Bryan v. Warner Quinlan Co., 141 Atl. 809, 104 L. 534; Murphy v. Core Joint Concrete Pipe Co., 110 N. J. L. 83, 164 Atl. 262; Standard Steel Car Co. v. McGuire, 161 Fed. 527, 3rd Cir.; Furey v. N. Y. Central R. R. Co. 67 L. 270, 51 Atl. 505; Dettmering v. English 64 L. 16, 44 Atl. 855; Land v. Fitzgerald 68 L. 28, 52 Atl. 229.

A further reason of utmost importance why this court should take jurisdiction is that the Circuit Court overlooked the stipulation of the parties which established plaintiff's status as an invitee on defendant's freight car. The restricted view of the plaintiff's status adopted by the court will work hardship and injustice upon him unless this court grants him a review of the case.

The decision also appears to be in conflict with the decisions of other Federal Circuit Courts of Appeal and with the decisions of the Appellate courts of other jurisdictions whose common law on the subject is the same as that of New Jersey.

Cudahy Packing Co. v. McBride, 92 F. (2d) 737 (8th Cir.) Cert. den. 303 U. S. 639. Gunnarson v. Robert Jacob Inc. 94 F. (2d) 170 (2nd Cir.) Cert. den. 303 U. S. 660; Norfolk Tidewater Terminals v. Wood Towing Corp. 94 F. (2d) 164 (4th Cir.); Kuptz v. Ralph Solitt & Sons, 88 F. (2d) 532 (5th Cir.); Henry W. Cross Co. v. Burns, 81 F. (2d) 856 (8th Cir.); Randolph v. Great Atlantic & Pacific Tea Co., 2 Fed. Supp. 462 aff. 64 F. (2d) 247 (3rd Cir.); Standard Oil Co. v. Robbins Dry Dock Co., 25 F. (2d) 339 (2nd Cir.); Fleischman Malting Co. v. Mrkacek, 14 F. (2d) 602 (7th Cir.); Middleton v. P. Sanford Ross, 213 F. 6 (4th Cir.); Langau v. Tyler, 114 F. 718 (2nd Cir.); Weatherford, M. W. & N. W.

Ry. Co. v. Duncan 32 S. W. 878 (Tex.); Pittsburg, C. C. & St. L. Ry. Co. v. Cozatl 79 N. E. 534 (Ind.); Rio Grande, E. P. & S. F. Ry Co. v. Gurzman 221 S. W. 1102; Baltimore & O. R. R. Co. v. Davis, 137 Atl. 30 (Court of Appeals, Md.); Welch v. Maine Central R. R. Co., 30 Atl. 116 (Me.); Lenard v. Kneeland 154 N. E. 94 (Mass.); Moffit v. Grand Rapids Ry. Co., 200 N. W. 274 (Mich.).

IV.

Specifications of Error.

The Circuit Court of Appeals erred when it held that the plaintiff exceeded the scope of the defendant's invitation by being on the freight car for a purpose other than loading at the time of his accident.

V.

Statement of Questions Presented.

1. Was the plaintiff, Hanson an invitee or a licensee on the freight car of the defendant at the time of his accident?

2. Was sufficient evidence adduced at the trial showing or tending to show that the defendant's employees failed to brake and chock the freight car or failed to brake and chock the car properly, in accordance with the admitted practice and customs, to justify the trial court in submitting the problem to the jury for determination?

Wherefore, your petitioner respectfully prays that a Writ of Certiorari issue to the Circuit Court of Appeals for the Third Circuit, and submits his brief hereto attached in support of his petition.

Respectfully submitted,

JAMES RAYMOND BERRY,
Counsel of Petitioner.